

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

MOJAVE UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2006090209

DECISION

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on November 2 and 28, 2006, in Mojave, California.

Student was represented by Brian Allen, advocate, at the prehearing conference and the hearing. Attorney David Burkenroad appeared briefly on the afternoon of the first hearing day, but otherwise did not participate in the proceedings. Student's mother (Mother) was present during the entire hearing.

Mojave Unified School District (District) was represented by attorney Kathleen LaMay. Bonnie O'Bar, the District's director of educational services, was present on behalf of the District on the first day of hearing. Robert Starnes, the District's director of special education, was present on behalf of the District on the second day of the hearing.

On September 8, 2006, Student filed a request for a due process hearing. On October 25, 2006, ALJ Skarda conducted a telephonic prehearing conference and issued a prehearing conference order. Sworn testimony and documentary evidence were received at the hearing on November 2 and 28, 2006. Upon receipt of the written closing arguments, the record was closed on December 5, 2006, and the matter was submitted.

ISSUES¹

- I. Did the District deny Student a free and appropriate public education (FAPE) by failing to complete a “functional behavioral report” pursuant to the February 7, 2006 assessment plan?
- II. Did the District fail to offer Student a FAPE in the individualized education plan (IEP) dated August 28, 2006, because:
 - A. the IEP fails to address Student’s sexually assaultive and maladaptive behaviors and Red Rock Community Day School (Red Rock) cannot adequately address Students behavioral needs;
 - B. the IEP lacks sufficient behavioral intervention case manager (BICM) services; and
 - C. the IEP is not reasonably calculated to provide Student with some educational benefit in the academic areas of reading and writing because it fails to offer sufficient resource specialist services?
- III. Did the District commit a procedural violation that resulted in a FAPE denial in the letter dated August 31, 2006?

CONTENTIONS OF THE PARTIES

Student contends that the District failed to complete an agreed-upon assessment called a “functional behavioral report.” According to Student, this failure denied Student a FAPE. Student proposed resolution is, in pertinent part, that “the District should be ordered and agree to complete an independent comprehensive assessment in the area of a Functional Behavioral Report.” The District contends that a functional behavioral report is an informal assessment that includes a record review, the results of which are presented verbally at an IEP team meeting. The District further contends that it completed a “functional behavior report” assessment and presented the results of the assessment verbally at IEP team meetings convened on March 27, 2006, and again on August 28, 2006. District does not dispute that it never created a written assessment report.

Student contends that the District failed to offer him a FAPE at the August 28, 2006 IEP team meeting. Student stipulated that the goals and objectives, as well as the mental health services offered in the IEP, are appropriate. Student contends, however, that Red Rock, the alternative school offered by the District at the IEP team meeting after Student was expelled from his home school, is inappropriate because Student requires a full-time special

¹For purposes of clarity and organization, the ALJ has reorganized Student’s issues as identified in Student’s due process hearing request and as clarified at the telephonic prehearing conference.

education teacher. Student also contends that the IEP is insufficient to confer a FAPE because it failed to adequately address his behaviors, and because Student requires a full-time behavioral intervention case manager (BICM), five days per week, six hours per day. Student requests a full time BICM and placement at Joshua Tree, another District school, as a remedy.

The District contends that Red Rock, because of the small class size (a two to five teacher/student ratio) and the substantial individual attention and emphasis on reading, will allow Student to make progress towards all of his goals and objectives, and to progress in the general education curriculum. The District also contends that Student does not require a full-time BICM, and that his behavioral goals, mental health services and behavioral support plan (BSP) adequately address Student's maladaptive behaviors.

Regarding the August 31, 2006 letter/procedural violation, Student's allegation was never made clear by his educational advocate at the prehearing conference, hearing or in the written closing argument. However, it appears that the substance of Student's contention is that the District committed a procedural violation when it sent her a clarifying letter three days after the August 28, 2006 IEP, because the letter *required* Student's mother to sign and agree to three IEPs, including two which were drafted at IEP team meetings which she failed to attend, in order for Student to remain at Red Rock. District contends that it committed no such procedural violation.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is a 12-year-old sixth-grade pupil who resides with his mother within the geographical boundaries of the District. He is eligible for special education and related services as a student with a specific learning disability (SLD) and has been diagnosed with attention deficit hyperactivity disorder (ADHD). Student is not currently attending any school.

Factual Background

2. Student was expelled by the Mojave Unified School District Board of Trustees on April 25, 2006 for sexual harassment.² He was placed in an interim alternative educational setting (IAES) at the District's alternative school, Red Rock, for approximately 10 days at the end of the 2005-2006 school year and again, albeit briefly, at the beginning of the current (2006-2007) school year.

² "Sexual harassment," includes, in pertinent part, "unwelcome sexual advances, requests for sexual favors, and other verbal, visual or physical requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the ... educational setting" (Ed. Code § 212.5.) Student's behaviors included, in pertinent part, performing a simulated sexual act on female students.

Functional Behavior Report

3. The District agreed to conduct a “functional behavior report” in an assessment plan dated January 7, 2006, signed by Student’s mother on or about February 7, 2006. The plan identifies the “assessment area” as “alternative means” and states that the District personnel responsible for the assessment are the behavioral intervention case manager (BICM) and a school psychologist.

4. As discussed in Legal Conclusions 9, 10 and 11, every assessment must be completed and discussed at an IEP team meeting held within 60 days of receipt of parental consent to the assessment. Moreover, all assessments must result in a written report.

5. Robert Starnes is the District’s director of special education, as well as a BICM. Mr. Starnes conducted a “functional behavioral report” assessment after receiving parental consent. His assessment included a record review, an observation, consultation with Student’s instructional assistant and data collection.

6. The District held an IEP team meeting on March 27, 2006. Student’s Mother was invited, but failed to attend.³ The IEP team meeting was a manifestation determination IEP team meeting, convened to discuss Student’s behavioral problems and their relationship to his disability.

7. Mr. Starnes verbally presented the results of his “functional behavioral report” assessment at the August 28, 2006 IEP team meeting. No written report was created.

8. Student failed to establish that the District failed to complete the “functional behavioral report” assessment and/or to convene a timely IEP team meeting to discuss the assessment. As determined above in Factual Findings 6 and 7, the report was presented at two IEP team meetings; one of the meetings convened within the 60-day statutory timeline, however, the District failed to prepare a written assessment report. Thus, the District committed a procedural violation.

9. As discussed Legal Conclusion 4, a procedural violation results in a FAPE denial only if it impeded the child’s right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of FAPE.

10. Student failed to establish that Mr. Starnes’ failure to prepare a written report impeded Student’s FAPE or deprived him of educational benefit. Likewise, Student failed to establish that his mother’s right to participate in the decision making process was significantly impeded. As discussed above, the assessment was discussed at the August 2006

³ Student did not raise the issue of whether the District’s act of holding the IEP team meeting without Mother was a procedural violation that resulted in a FAPE denial.

IEP team meeting and Student's mother was present. Accordingly, the procedural error did not deny Student a FAPE.

The August 28, 2006 IEP

11. As discussed in Legal Conclusions 5 and 7, an appropriate IEP must be designed to meet a pupil's unique needs, reasonably calculated to provide him with some educational benefit, and services must be provided in conformity with the IEP. As discussed in Legal Conclusion 8, disabled children like Student who have been "expelled" from school must still receive a FAPE. However, the FAPE may be provided in a different setting (an IAES). The District convened Student's annual IEP team meeting on August 28, 2006. The IEP team drafted goals addressing Student's unique needs in the areas of mathematics, writing, reading, and behavior. Student stipulated that the goals and objectives were appropriate. The District again offered Red Rock as an IAES during the period of Student's expulsion. As discussed below, the IAES of Red Rock was a FAPE for Student.

Student's Unique Needs: Sexually Assaultive Behaviors and Maladaptive Behaviors

12. Student contends that the August IEP fails to address his unique "sexually assaultive" behaviors. However, Student's mother testified that Student *has not* engaged in "sexually assaultive" behaviors.

13. Student failed to establish that the August 28, 2006 IEP should have addressed "sexually assaultive" behaviors.

14. Regarding Student's unique maladaptive behaviors, the August 28, 2006 IEP contains a behavioral goal and corresponding objectives designed to "decrease classroom talking and inappropriate playground behavior by following redirection by the teacher 5 of 5 times as measured by teacher observation and records."

15. The IEP also incorporates Student's behavior support plan (BSP) into his IEP. The BSP addresses behaviors that interfered with learning, including Student's failure to remain in his seat, anger, and his problems with confrontations.

16. Lorraine Harter is an employee of College Community Mental health. She has more than 27 years experience working as a case manager; her duties include working with children like Student with maladaptive behaviors. Ms. Harter has provided services to Student at his home two times per month since August 2006, and she is familiar with Student's behavioral needs. Her testimony established that Student's IEP adequately addresses Student's behavioral needs. Ms. Harter explained that the social skills services

provided by her agency at Red Rock for all students would adequately address Student's maladaptive behaviors, including his anger management and social relationship difficulties.⁴

17. Student failed to establish that the August 2006 IEP fails to address Student's unique maladaptive behavioral needs. Indeed, Student's own expert witness established that the IEP is appropriate.

Student's Unique Needs: BICM Services

18. Student contended that he requires the services of a full-time BICM, (five-days per-week, six-hours-per-day).

19. Student presented no evidence regarding Student's need for a full-time BICM

20. Student failed to establish that he requires a full-time BICM.

Whether Red Rock can Adequately Address Student's Behavior Needs

21. As determined in Factual Finding 16, Ms. Harter's testimony established that Student's behavioral needs can be adequately addressed at Red Rock.

22. Student failed to establish that the August 28, 2006 IEP failed to address any of Student's unique needs.

Are the Special Education Services offered in the August 28, 2006 IEP Reasonably Calculated to Provide Student with Some Educational Benefit?

23. The District offered Student placement at Red Rock in a small class (five students) taught by Darlene Everidge Coccari, a regular education teacher, and a full-time paraprofessional.⁵ The District offered the following special education services to implement Student's reading, writing, math and behavior goals and objectives: (1) thirty minutes of "push in" resource specialist services, five days each week; (2) thirty minutes of consultation services, one time each week; (3) two to four sessions of direct "AB 3632/2726" services per week at Red Rock, Student's home and in a clinic setting.

24. Ms. Coccari received special education training during her teacher credentialing program, and has substantial experience providing special education services to disabled children using a collaborative model, although she is not a credentialed special

⁴ Ms. Harter was called by Student's advocate to establish that the August 2006 IEP was *not* appropriate, i.e., that it failed to address his unique behavioral needs. Her testimony, of course, was that the placement *was* appropriate. She also testified that Student wants to return to school at Red Rock.

⁵ Student attended Red Rock for approximately two weeks at the beginning of the school year, although Student's mother never consented to the IEP. Accordingly, Ms. Coccari was familiar with Student's disability, behavior issues, as well as his unique needs.

education teacher. The “collaborative model” includes regular consultation with a credentialed special education teacher, such as a resource specialist. Ms. Coccari has successfully implemented goals and objectives in numerous students’ IEPs using the collaborative model.

25. In addition to the significant amount of individual attention provided to all five children in Ms. Coccari’s class (because of the small student-to-teacher ratio) all pupils are provided with approximately forty minutes of direct instruction from a trained paraprofessional in the area of reading every day.

26. Student’s mother testified that she read on the internet that peer relationships are more important for pupils such as Student and that he should attend a different school. She also testified that Student requires a full-time special education teacher.

27. Student’s previous IEPs did not include the services of a full-time special education teacher. Student was mainstreamed for the bulk of his academics in previous IEPs.

28. Student failed to establish that the August 28, 2006 IEP is not reasonably calculated to provide Student with some educational benefit, i.e., that the services and placement would not allow Student to achieve his academic and behavioral goals and corresponding objectives. Indeed, the testimony of Student’s teachers and that of Mr. Starnes established that Student’s placement and services in the August 28, 2006 IEP are appropriate.

29. As discussed above in Factual Findings 11 through 28, Student failed to establish that the August 28, 2006 IEP was not a FAPE.

The August 31, 2006 Letter

30. The August 31, 2006 letter requests that Student’s mother sign one of three IEPs in order for Student to continue to attend Red Rock. One of the IEPs Student’s Mother could have signed in order for Student to continue to attend Red Rock was the August 28, 2006 IEP.

31. Because it has been determined above that the August 28, 2006 IEP offered Student a FAPE, the District did not commit a “procedural violation” when it asked Student’s mother to sign one of the IEPs.

LEGAL CONCLUSIONS

Applicable Law

1. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement

Act of 2004 (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1401(8)(IDEA 1997); 20 U.S.C. § 1402(9)(IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25)(IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

2. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) California Education Code section 56363, subdivision (a), similarly provides that DIS, California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

3. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.Ct. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

4. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E)(ii); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

5. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the District's program was designed to address Student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that District provided a FAPE, even if

Student's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit.⁶

6. An IEP is a written statement that must be developed, reviewed, and revised for each student with a disability. (34 C.F.R. § 300.340(a); Ed. Code, § 56345.) The IEP must include a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children). The IEP must also include a statement of the goals and short-term objectives/benchmarks of the special education and related services, of the program modifications or supports for school personnel that are to be provided to enable the student to be involved in and progress in the general curriculum, and to be educated and participate with disabled and nondisabled peers in extracurricular and other nonacademic activities. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347; Ed. Code, §§ 56343, 56345.)

7. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider appropriate strategies, including positive behavioral interventions, strategies, and supports to address that behavior. (Ed. Code § 56341.1; 34 C.F.R. § 300.346.)

8. A school district may apply its disciplinary procedures to a disabled child in the same manner and for the same duration as the procedures would be applied to non-disabled children, i.e., they may be suspended, expelled or otherwise disciplined just like their typically developing, non-disabled peers.⁷ (20 U.S.C. §1415 (k)(1)(C).) However, a disabled child must continue to receive special education services required by his or her IEP, although they may be provided in an "interim alternative educational setting" (IAES). (20 U.S.C. §1415 (k)(1)(D); 20 U.S.C. §1412 (a)(1).) While placed in the IAES, a disabled child must (1) receive a FAPE "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress towards meeting the goals set out in the child's IEP," and (2) if appropriate, receive a functional behavioral assessment, behavioral intervention services and modifications so that the behavior that caused the disciplinary action does not recur. (*Id.*)

9. Special education students must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program for

⁶ School districts are also required to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.550(b); Ed. Code, § 56031.)

⁷There are exceptions, none of which apply in the current matter. For example, if a child's behavior that resulted in a disciplinary action is a "manifestation" of his or her disability, the school district may not necessarily change the child's placement. In the present case, Student did not challenge the District's determination that Student's disability was not a manifestation of his disability.

the student. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code § 56320, subds.(e) & (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subds. (a) & (b).)

10. A local educational agency must reassess a child with a disability if the child's parent or teacher requests an assessment, every three years or if "conditions warrant a reevaluation."⁸ (34 C.F.R. § 300.536; Ed. Code § 56381.)

11. An individualized education program meeting must be held to within 60 days of receipt of the parents' written consent for assessment, unless the parent agrees, in writing, to an extension. (Ed. Code §§ 56344, subd. (a).) The personnel who assess the pupil must prepare a written report, or reports, as appropriate, of the results of each assessment. (Ed. Code § 56327.)

12. The Ninth Circuit Court of Appeal has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

13. Petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (2005) 546 U.S. 49, [126 S.Ct. 528, 163 L.Ed 2d 387.])

Determination of Issues

Issue I: Did the District deny Student a free and appropriate public education (FAPE) by failing to complete a "functional behavioral report" pursuant to the February 7, 2006 assessment plan?

14. As determined above in Factual Finding 8, the District committed a procedural violation when it failed to prepare an assessment report. As discussed Legal Conclusion 4, a procedural violation results in a FAPE denial if it impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE. As determined in Factual Findings 9, 10 and 11, the error did not impede Student's right to FAPE, deprive him of educational benefits, nor did it significantly impede his mother's right to participate in the decision making process. Accordingly, the procedural error was harmless.

⁸In California "assessment" is synonymous with the IDEA term "evaluation." (Ed. Code § 56302.5.)

Issue II(A): Did the District fail to offer Student a FAPE in the August 28, 2006 IEP because the IEP failed to adequately address Student's maladaptive and sexually assaultive behaviors and because Red Rock cannot address Student's behavioral needs?

15. As discussed in Legal Conclusions 5 and 7, Student's IEP must address his unique needs. As determined in Factual Finding 22, Student failed to establish that the IEP failed to address any of his unique needs. Accordingly, the District did not deny Student a FAPE.

Issue II(B): Did the August 28, 2006 IEP lack sufficient BICM services?

16. As discussed in Legal Conclusions 5 and 7, Student's IEP must address his unique needs. As determined in Factual Finding 20, Student failed to establish that he has a unique need for a full-time BICM. Accordingly, the District did not deny Student a FAPE.

Issue II(C): Did the District offer Student sufficient special education services in the August 28, 2006 IEP?

17. As discussed in Legal Conclusions 5 and 7, Student's IEP must provide services which are reasonably calculated to provide him with some educational benefit. As determined in Factual Finding 28, Student failed to establish that the services offered in the August 28, 2006 IEP were insufficient.

18. As determined in Factual Finding 29, Student failed to establish that the August 28, 2007 IEP was not a FAPE.

Issue III: Did the District commit a procedural violation and deny Student a FAPE in the August 31, 2006 letter?

19. As determined in Factual Finding 31, the District did not commit a procedural violation.

ORDER

In light of the above factual findings and legal conclusions, all of Student's requests for relief are denied.

PREVAILING PARTY


Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and

decided. The following findings are made in accordance with this statute: *The District prevailed on all issues heard and decided.*

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code § 56505, subd. (k).)

IT IS SO ORDERED THIS 26th DAY OF December 2006.

A handwritten signature in black ink that reads "Trevor Skarda". The signature is written in a cursive, flowing style.

TREVOR SKARDA

Administrative Law Judge
Office of Administrative Hearings
Special Education Division